

Recommendation for Preliminary Adoption of Amendments to 312 IAC 3-1 to Provide for Consolidated Proceedings between the Administrative Law Judges of the Natural Resources Commission and the Office of Environmental Adjudication; Administrative Cause No. 08-057A

Recently enacted Public Law 84-2008 (SEA 134) authorizes parties in related adjudications before the Natural Resources Commission's Division of Hearings ("NRC Hearings") and the Office of Environmental Adjudication ("OEA"), where the related adjudications involve issues of water quantity or water quality, to combine them into a single adjudication. Sen. Robert Meeks authored the legislation. It directs NRC Hearings and OEA to adopt a joint rule to assist with implementation. A copy of P.L. 84 is attached as Exhibit 2.

In March, NRC Hearings and OEA began the development of parallel rules for P.L. 84. OEA amendments would be included within 315 IAC and are not reproduced here.

The Environmental Law Section of the Indiana State Bar Association supported the enactment of P.L. 84 during the recent session of the Indiana General Assembly. Informal comments from the Environmental Law Section have been solicited in anticipation of preliminary adoption.

The recommendation is that the Natural Resources Commission give preliminary adoption to amendments to its procedural rule (312 IAC 3-1), and most prominently to proposed new 312 IAC 3-1-10.5, to help implement P.L. 84. A copy of the rule draft is attached as Exhibit 1.

Exhibit 1 (Proposed Rule)

312 NATURAL RESOURCES COMMISSION

DIGEST

Amends 312 IAC 3-1 which establishes procedural rules for the natural resources commission, division of hearings, to provide for the consolidation of proceedings with the office of environmental adjudication as required by SEA 134. Effective 30 days after filing with the Publisher.

312 IAC 3-1-1

312 IAC 3-1-2

312 IAC 3-1-8

312 IAC 3-1-10.5

SECTION 1. 312 IAC 3-1-1 IS AMENDED TO READ AS FOLLOWS:

312 IAC 3-1-1 Administration

Authority: IC 14-10-2-4; IC 14-10-2-2.5; IC 25-31.5-3-8

Affected: IC 4-21.5; IC 14; IC 25

Sec. 1. (a) This rule controls proceedings governed by IC 4-21.5 for which the commission, or an administrative law judge for the commission, is the ultimate authority. **In conjunction with 315 IAC 1-1, the rule also governs a proceeding consolidated with the office of environmental adjudication under IC 14-10-2-2.5(b).**

(b) An affected person who is aggrieved by a determination of:

- (1) the director;
- (2) a delegate of the director;
- (3) a board (other than the commission when acting as the ultimate authority);
- (4) a delegate of the board (other than an administrative law judge);
- (5) a person who has been delegated authority under 312 IAC 2-2;
- (6) the Indiana board of licensure for professional geologists under IC 25-17.6; or
- (7) the Indiana board of registration for soil scientists under IC 25-31.5;

may apply for administrative review of the determination under IC 4-21.5 and this rule.

(c) As used in this rule, "division director" refers to the director of the division of hearings of the commission. (*Natural Resources Commission; 312 IAC 3-1-1; filed Feb 5, 1996, 4:00 p.m.: 19 IR 1317; filed Oct 19, 1998, 10:12 a.m.: 22 IR 748; filed Aug 29, 2002, 1:03 p.m.: 26 IR 7; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546*)

SECTION 2. 312 IAC 3-1-2 IS AMENDED TO READ AS FOLLOWS:

312 IAC 3-1-2 Ultimate authority

Authority: IC 14-10-2-4; IC 14-10-2-2.5; IC 25-31.5-3-8

Affected: IC 4-21.5-4; IC 14; IC 25

Sec. 2. (a) Except as provided in ~~subsection (b)~~ **this section**, the commission is the ultimate authority for the department and any department board.

(b) **Except as provided in subsection (d)**, an administrative law judge is the ultimate authority for an administrative review under the following:

- (1) An order under IC 14-34, except for a proceeding:
 - (A) concerning the approval or disapproval of a permit application or permit renewal under IC 14-34-4-13; or
 - (B) a proceeding for suspension or revocation of a permit under IC 14-34-15-7.
- (2) An order granting or denying temporary relief under IC 14-34 or an order voiding, terminating, modifying, staying, or continuing an emergency or temporary order under IC 4-21.5-4.
- (3) An order designated as a final order in section 9 of this rule.
- (c) An administrative law judge is also the ultimate authority for the following:

AGENDA ITEM #7

(1) The Indiana board of licensure for professional geologists under IC 25-17.6.

(2) The Indiana board of registration for soil scientists under IC 25-31.5.

(d) For a proceeding consolidated with the office of environmental adjudication under IC 14-10-2-2.5(b), the panel described in IC 14-10-2-2.5(c) is the ultimate authority for administrative review. (*Natural Resources Commission; 312 IAC 3-1-2; filed Feb 5, 1996, 4:00 p.m.: 19 IR 1317; filed Oct 19, 1998, 10:12 a.m.: 22 IR 749; filed Dec 26, 2001, 2:42 p.m.: 25 IR 1543; filed Aug 29, 2002, 1:03 p.m.: 26 IR 8; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546*)

SECTION 3. 312 IAC 3-1-8 IS AMENDED TO READ AS FOLLOWS:

312 IAC 3-1-8 Administrative law judge; automatic change

Authority: IC 14-10-2-4; IC 14-10-2-2.5; IC 25-31.5-3-8

Affected: IC 4-21.5-4; IC 14; IC 25

Sec. 8. (a) In addition to the reasons stated for the disqualification of an administrative law judge under IC 4-21.5, an automatic change of administrative law judge may be obtained under this section.

(b) A party, within ten (10) days after the appointment of an administrative law judge, may file a written motion for change of the administrative law judge without specifically stating the ground for the request.

(c) The administrative law judge shall grant a motion filed under subsection (b) and promptly notify the division director. The division director shall inform the parties of the names of two (2) other individuals from whom a substitute administrative law judge may be selected. A party who is opposed to the party who filed the motion under subsection (b) may, within five (5) days, select one (1) of the individuals named by the division director to serve as the substitute administrative law judge. In the absence of a timely designation by an opposing party under this subsection, the selection shall be made by the division director.

(d) This section does not apply:

(1) where a previous change of administrative law judge has been requested under this section;

(2) to a proceeding under IC 4-21.5-4;

(3) to temporary relief under:

(A) IC 13-4.1 before its repeal; or

(B) IC 14-34;

(4) if an administrative law judge has issued a stay or entered an order for disposition of all or a portion of the proceeding;

(5) if the commission orders a suspension of the section where its continued application is impracticable as a result of inadequate staffing; ~~or~~

(6) to a proceeding to review a determination by the Indiana board of licensure for professional geologists or the Indiana board of registration for soil scientists; **or**

(7) to a member of a panel described in IC 14-10-2-2.5(c).

(*Natural Resources Commission; 312 IAC 3-1-8; filed Feb 5, 1996, 4:00 p.m.: 19 IR 1319; filed Feb 7, 2000, 3:31 p.m.: 23 IR 1365; filed Aug 29, 2002, 1:03 p.m.: 26 IR 8; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546*)

SECTION 4. 312 IAC 3-1-10.5 IS ADDED TO READ AS FOLLOWS:

312 IAC 3-1-10.5 Consolidated Proceedings with Office of Environmental Adjudication

Authority: IC 14-10-2-4; IC 14-10-2-2.5; IC 4-21.5-3-31

Affected: IC 4-21.5-3-29; IC 14; IC 25

Sec. 10.5. (a) This section controls the conduct of a proceeding presided over by an administrative law judge which is consolidated under IC 14-10-2-2.5 with a proceeding presided over by an environmental law judge of the office of environmental adjudication.

(b) Before acting on a motion for consolidation under IC 14-10-2-2.5(b), an administrative law judge or environmental law judge may do any of the following:

(1) Consult with any administrative law judge or environmental law judge that presides over a proceeding sought to be consolidated.

(2) Request documents, briefs, or oral arguments from the parties to the following:

AGENDA ITEM #7

(A) The proceeding pending before the administrative law judge or environmental law judge.

(B) The proceeding sought to be consolidated.

(c) If an administrative law judge or an environmental law judge enters an order for consolidation under IC 14-10-2-2.5(b), the order shall establish a panel that complies with IC 14-10-2-2.5(c).

(d) Unless otherwise agreed by the panel, the administrative law judge or environmental law judge that entered the order under subsection (c) shall perform the following functions:

(1) Open and maintain a new adjudicatory file which includes in its caption the phrase "In the Matter of Consolidated Proceeding under IC 14-10-2-2.5".

(2) Include true and authentic copies of all pleadings and documents previously filed and orders previously entered in the proceedings which have been consolidated.

(3) Rule upon routine motions and requests by the parties, including objections at hearing. This subdivision does not prohibit the administrative law judge or environmental law judge from consulting with another panel member or members before ruling.

(e) The panel may make any orders concerning a consolidated proceeding as may tend to avoid unnecessary costs or delay.

(f) The panel, in furtherance of convenience and to avoid prejudice, or when separate hearings may be conducive to expedition and economy, may order a separate hearing of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or any number of claims, cross-claims, counterclaims, third-party claims, or issues.

(g) In furtherance of convenience and to avoid prejudice, the panel may certify a disposition of fewer than all issues as being ripe for judicial review where:

(1) A dismissal is granted with prejudice;

(2) A summary judgment is granted under IC 4-21.5-3-23; or

(3) A separate hearing is conducted under subsection (f).

(h) On a party's motion or on the panel's motion, the panel may terminate a consolidated proceeding in furtherance of convenience and to avoid prejudice. If a party moves to terminate a consolidated proceeding because all issues of the department of natural resources or of the department of environmental management have been settled or adjudicated, the panel shall terminate the consolidated proceeding. An order for termination shall include any provisions which may reasonably support the convenience of the parties and the expeditious disposition by an administrative law judge or environmental law judge of the remaining proceeding.

(i) A final disposition of a consolidated proceeding shall be included both by the commission and by the office of environmental adjudication in their respective implementations of IC 4-21.5-3-32 and IC 4-21.5-3-27(c). (*Natural Resources Commission; 312 IAC 3-1-10.5*)

Exhibit 2 (Legislation)

SECTION 1. IC 4-21.5-7-5, AS AMENDED BY P.L.99-2005, SECTION 2, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 5. **Except as provided in IC 14-10-2-2.5**, an environmental law judge is the ultimate authority under this article for reviews of agency actions of the department of environmental management, actions of a board described in IC 13-14-9-1, and challenges to rulemaking actions by a board described in IC 13-14-9-1 made pursuant to IC 4-22-2-44 or IC 4-22-2-45.

SECTION 2. IC 4-21.5-7-5.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 5.5. **A proceeding that is subject to the jurisdiction of both the office and the natural resources commission's division of hearings established under IC 14-10-2-2 may be consolidated under IC 14-10-2-2.5.**

SECTION 3. IC 14-10-2-2.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 2.5. (a) A person who is the party in a hearing under this title or IC 4-21.5-7 may move to have the:

AGENDA ITEM #7

- (1) environmental law judge appointed under IC 4-21.5-7; or
 - (2) administrative law judge appointed under section 2 of this chapter;
- consolidate multiple proceedings that are subject to the jurisdiction of both the office of environmental adjudication and the division of hearings.
- (b) The environmental law judge or the administrative law judge shall grant the motion made under subsection (a) if the following findings are made:
- (1) The proceedings include the following:
 - (A) Common questions of law or fact.
 - (B) At least one (1) person, other than the department or the department of environmental management, who is a party to all the proceedings.
 - (C) Issues of water quality, water quantity, or both.
 - (2) Consolidation may support administrative efficiency.
- (c) If a motion to consolidate proceedings has been granted under subsection (b), the hearing must be conducted by a panel that consists of at least one (1) environmental law judge and one (1) administrative law judge. The panel is the ultimate authority for matters authorized under IC 4-21.5-7-5 and this title. Any party, including the department and the department of environmental management, may petition an appropriate court for judicial review of a final determination of the panel.
- (d) The office of environmental adjudication and the division of hearings shall adopt joint rules to implement this section.

SECTION 4. IC 14-10-2-3 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 3. Except as provided in **section 2.5 of this chapter** and IC 14-34-2-2, the commission is the ultimate authority of the department under IC 4-21.5.

SECTION 5. IC 14-34-2-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 2. (a) The commission shall appoint the following:

- (1) An administrative law judge to conduct proceedings under IC 4-21.5. An administrative law judge is subject to IC 14-10-2-2.
- (2) A hearing officer to conduct proceedings under IC 4-22-2.
- (b) An administrative law judge is the ultimate authority for the department for any administrative review proceeding under this article, except for the following:
 - (1) Proceedings concerning the approval or disapproval of a permit application or permit renewal under IC 14-34-4-13.
 - (2) Proceedings for suspension or revocation of a permit under IC 14-34-15-7.
 - (3) **Proceedings consolidated with the office of environmental adjudication under IC 14-10-2-2.5.**
- (c) An order made by an administrative law judge granting or denying temporary relief from a decision of the director is a final order of the department.
- (d) Judicial review of a final order made by an administrative law judge under subsection (b) or (c) or under IC 13-4.1-2-1(c) or IC 13-4.1-2-1(d) (before their repeal) may be taken under IC 4-21.5-5.